A **PEMUNGUT DUTI SETEM, PULAU PINANG**

v.

MALAYSIA SMELTING CORPORATION BHD

B FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASHIM YUSOFF FCJ
HASAN LAH FCJ
[CIVIL APPEAL NO: 02(f)-40-2011(P)]
C 9 FEBRUARY 2012

REVENUE LAW: *Stamp duty - Assessment - Transfer of shares - Adjudication of - Whether stamp duty assessed based on value of RM1 per share as stated in share transfer form (Form 32A) - Stamp Act 1949, First Schedule item 32(b)*

D Rahman Hydraulic Tin Sdn Bhd ('the company') was a private limited company with a paid-up capital of RM97,232,142 which comprised of 97,232,142 ordinary shares of RM1 each. Under a workout proposal, the entire paid-up share capital of the company E was held by Anggun Pintas Sdn Bhd ('the vendor'). Pursuant to an open tender exercise for sale of the company's entire paid-up capital, the respondent purchased the company's shares from the vendor at the price of RM15,000,000. For adjudication purposes under s. 36(1) of the Stamp Act 1949 ('the Act'), the respondent F submitted the share transfer form, issued under s. 103(1) of the Companies Act 1965 ('Form 32A') dated 22 November 2004 transferring 97,232,142 ordinary shares of RM1 each from the vendor to the respondent at the consideration sum of RM15,000,000. It was assessed by the Deputy Collector of G Stamp Duty that the duty payable was RM291,699 based on the par value of the said shares of RM97,232,142. The respondent objected to the assessment and contended that the assessment should be RM45,000 based on the consideration of RM15,000,000. However, the Deputy Collector of Stamp Duty rejected the H respondent's objection and the latter appealed to the High Court. In dismissing its appeal, the High Court held that the par value of RM1 per share was the actual value for the company's shares at the date of transfer and hence, the duty chargeable on the Form 32A would be RM291,699 based on the total share value I of RM97,232,142. On appeal, the Court of Appeal allowed the respondent's appeal and decided that (i) the par value of RM1 per share (or RM97,232,142 for the entire paid-up capital) was not

the actual value of the company's shares at the date of transfer (ii) the best available evidence of value of the company's shares at the date of transfer was the purchase price of RM15,000,000 and (iii) the duty chargeable on the Form 32A was RM45,000. Dissatisfied with the decision, the appellant appealed to this court. Leave to appeal was granted and the issue that arose for consideration was whether the value of RM1 per share as stated in Form 32A or value for the share based on the balance sheet for the financial year ended December 2003 was the value of the company's share on the date of transfer for the purpose of ascertaining the stamp duty payable in respect of the share transfer under item 32(b) of the first schedule of the Act.

Held (dismissing the appellant's appeal with costs)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) The par value of RM1 as stated in Form 32A was not indicative of the actual value of the shares for the purpose of ascertaining stamp duty. The said Form 32A did not state that the value of the share is RM1 per share. The phrase "ordinary shares of RM1 each" appears in the column entitled "description of securities" in the said Form 32A and this is only a description of the shares. The words "ordinary shares of RM1 each" is the usual form of describing shares and the RM1 refers to the par value of the shares. (para 8)

(2) The par value was not the actual value of the shares at the date of the transfer because the par value was only a face value while the value of the company waxes and wanes, amongst other things, according to its performance and outlook. The par value may represent the actual value or true value of the shares on the date the shares were first issued, provided that the shares were not issued at a premium, but once the company starts carrying on business, the par value would no longer reflect the actual value of the shares as the company may have made profits or incurred losses or the assets of the company may have appreciated or depreciated. (para 10)

(3) Although the Form 32A was dated 22 November 2004, there was no evidence that the value of the shares at the date of transfer was more than at the time of the purchase, and given that there was no dispute raised whether the open tender sale

was at arm's length or not, the best available evidence of the value of the shares of the company on the date of transfer was the purchase price of RM15,000,000. (para 13)

(4) The manner in which the consideration price was arrived at would indicate that it represented the market value of the company's shares. There was an open tender exercise and pursuant to that exercise, the appellant's bid of RM15,000,000 was accepted. In any event, as the purchase price of RM15,000,000 was higher than the value of the shares based on the balance sheet, pursuant to item 32(b) of the Act, the stamp duty would be assessed on the purchase price. (para 14)

(5) The value of the shares based on the balance sheet for the financial year ended December 2003 was the value to the company's shares on the date of transfer for the purpose of ascertaining stamp duty payable in respect of the transfer of shares under item 32(b) of the Act. Hence, the stamp duty payable in the Form 32A would be based on the sale consideration of RM15,000,000. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Rahman Hydraulic Tin Sdn Bhd ('syarikat') adalah sebuah syarikat sendirian berhad dengan modal berbayar sebanyak RM97,232,142 yang terdiri daripada 97,232,142 saham biasa untuk RM1 setiap satu. Di bawah satu cadangan penyelesaian, segala modal berbayar saham syarikat telah dipegang oleh Anggun Pintas Sdn Bhd ('penjual'). Melalui satu pelaksanaan tender terbuka bagi penjualan segala modal berbayar syarikat, responden telah membeli saham syarikat itu daripada penjual pada harga RM15,000,000. Bagi tujuan penilaian di bawah s. 36(1) Akta Setem 1949 ('Akta'), responden telah menyerah borang pindah milik saham, yang dikeluarkan di bawah s. 103(1) Akta Syarikat 1965 ('Borang 32A') bertarikh 22 November 2004 dengan memindahmilik 97,232,142 saham biasa sebanyak RM1 setiap satu daripada penjual kepada responden pada jumlah balasan sebanyak RM15,000,000. Ianya telah ditaksirkan oleh Timbalan Pemungut Duti Setem bahawa duti yang perlu dibayar adalah RM291,699 berdasarkan nilai tara saham tersebut sebanyak RM97,232,142. Responden pula telah membantah pentaksiran itu dan menegaskan bahawa taksiran sepatutnya adalah RM45,000 berdasarkan balasan sebanyak RM15,000,000. Walaubagaimanapun, Timbalan Pemungut Duti Setem menolak bantahan responden dan responden telah merayu

ke Mahkamah Tinggi. Dalam menolak rayuannya, Mahkamah Tinggi memutuskan bahawa nilai tara RM1 setiap saham adalah nilai sebenar saham syarikat pada tarikh pindah milik dan oleh itu, duti yang perlu dibayar untuk Borang 32A ialah RM291,699 berdasarkan nilai saham keseluruhannya berjumlah RM97,232,142. Atas rayuan, Mahkamah Rayuan telah membenarkan rayuan responden dan memutuskan bahawa (i) nilai tara RM1 setiap saham (atau RM97,232,142 bagi keseluruhan modal berbayar) bukanlah nilai sebenar saham syarikat pada tarikh pindah milik (ii) keterangan paling bagus tentang nilai saham syarikat pada tarikh pindah milik adalah harga balasan sebanyak RM15,000,000 dan (iii) duti yang perlu dibayar atas Borang 32A adalah RM45,000. Tidak puas hati dengan keputusan itu, perayu merayu ke mahkamah ini. Kebenaran merayu dibenarkan dan isu yang berbangkit untuk pertimbangan adalah sama ada nilai tara RM1 setiap saham seperti yang dinyatakan di Borang 32A atau nilai saham berdasarkan kunci kira-kira tahun kewangan berakhir Disember 2003 adalah nilai saham syarikat pada tarikh pindah milik bagi kehendak untuk menentukan duti setem yang perlu dibayar berdasarkan pindah milik saham di bawah item 32(b) jadual pertama Akta.

Diputuskan (menolak rayuan perayu dengan kos)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Nilai tara RM1 seperti yang dinyatakan dalam Borang 32A tidak menandakan nilai sebenar saham bagi kehendak untuk menentukan duti setem. Borang 32A tersebut tidak menyatakan bahawa nilai saham adalah RM1 setiap saham. Ungkapan "saham biasa bernilai RM1 setiap satu" yang terdapat di ruangan bertajuk "perihal sekuriti" di dalam Borang 32A tersebut dan ini hanyalah merupakan diskripsi saham itu. Perkataan "saham biasa RM1 setiap satu" biasanya digunakan dalam penghuraian saham dan RM1 merujuk kepada nilai tara saham itu.

(2) Nilai tara bukanlah nilai sebenar saham pada tarikh pindah milik kerana nilai tara hanyalah nilai muka manakala nilai syarikat akan bertambah besar dan berkurangan, di antara lain, menurut tahap pencapaian dan kejayaannya. Nilai tara mungkin menggambarkan nilai sebenar atau nilai betul saham pada tarikh saham pertama kalinya dikeluarkan, dengan syarat bahawa saham tidak dikeluarkan atas premium, tetapi selagi syarikat

mula menjalankan perniagaan, nilai tara tidak akan mencerminkan nilai sebenar saham syarikat memandangkan syarikat mungkin telah membuat keuntungan atau mendapat kerugian atau pun aset syarikat bertambah atau menyusut.

(3) Walaupun Borang 32A bertarikh 22 November 2004, tiada bukti bahawa nilai saham pada tarikh pindah milik adalah lebih pada masa belian, dan oleh kerana tiada pertikaian dibangkitkan sama ada penjualan tender terbuka diperolehi dalam suatu transaksi setaraf atau tidak, keterangan paling bagus saham syarikat pada tarikh pindah milik adalah harga belian itu sebanyak RM15,000,000.

(4) Cara di mana harga balasan dicapai akan menunjukkan bahawa ianya mewakili nilai pasaran saham syarikat. Disini wujud pelaksanaan tender terbuka dan melalui pelaksanaan tersebut, tawaran perayu untuk RM15,000,000 telah diterima. Dalam apa jua keadaan, memandangkan harga belian untuk RM15,000,000 adalah tinggi berbanding dengan nilai saham berdasarkan kunci kira-kira, menurut item 32(b) Akta, duti setem akan dinilai berdasarkan harga belian.

(5) Nilai saham berdasarkan kunci kira-kira bagi tahun kewangan berakhir Disember 2003 adalah nilai bagi saham syarikat pada tarikh pindah milik bagi tujuan menentukan duti setem yang perlu dibayar berkenaan pindah milik saham di bawah item 32(b) Akta. Oleh itu, duti setem untuk dibayar dalam Borang 32A adalah berdasarkan balasan jualan sebanyak RM15,000,000.

Case(s) referred to:

BASF Services (M) Sdn Bhd v. Pemungut Duti Setem [2010] 5 CLJ 109 FC ***(refd)***

Hatrick v. Commissioner of Inland Revenue [1963] NZLR 641 ***(refd)***

Union of India v. Kulu Valley Transport Ltd & Others (1958) 28 Com Cas 29 Punj ***(refd)***

Legislation referred to:

Companies Act 1965, s. 103(1)

Stamp Act 1949, ss. 13(1)(b), 36(1), 39(1), First Schedule, items 32(b), 71

For the appellant - Norhisham Ahmad (Noor Faezah Zainudin with him); FCs

For the respondent - Ghazi Ishak (G Arumugam with him); M/s Ghazi & Lim

[Editor's note: For the Court of Appeal judgment, please see Malaysia Smelting Corporation Bhd v. Pemungut Duti Setem, Pulau Pinang [2011] 4 CLJ 361].

Reported by Kumitha Abd Majid

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal in allowing the respondent's appeal against the decision of the High Court at Penang in dismissing the respondent's appeal on a case stated from the decision of Deputy Collector of Stamp Duty in respect of stamp duty payable on the sale and transfer of shares to the respondent under item 32(b) of the Stamp Act 1949 ("the Act")

Background Facts

[2] The relevant background facts leading to the present appeal before this court are as follows:

(1) Rahman Hydraulic Tin Sdn Bhd ("the company") is a private limited company with a paid-up capital of RM97,232,142 comprising of 97,232,142 ordinary shares of RM1 each.

(2) Under a Workout Proposal pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998, the entire paid-up share capital of the company was held by Anggun Pintas Sdn Bhd ("the vendor").

(3) The vendor then conducted an open tender exercise for the sale of the entire paid-up capital of the company comprising 97,232,142 ordinary shares of RM1 each ("the company's shares").

(4) This tender and sale was subject to the condition that only the Mining Assets and Liabilities would remain with the company after the sale. The Non-Mining Assets and Liabilities would be transferred to the vendor.

(5) The respondent submitted a tender to purchase the company's Shares from the vendor at the tender price of RM15,000,000.

(6) The Share Sale Agreement provided that all assets (excluding the Mining Rights and the Related Assets) of the company shall be transferred to the Vendor on/before the Completion Date.

(7) The respondent then submitted to the Deputy Collector of Stamp Duty for adjudication under s. 36(1) of the Act, the Share Transfer Form issued under s. 103(1) of the Companies Act 1965 ("Form 32A") dated 22 November 2004 transferring 97,232,142 ordinary shares of RM1 each from the vendor to the respondent at the consideration sum of RM15,000,000.

(8) The Deputy Collector of Stamp Duty assessed the duty payable on the Form 32A under item 32(b) of the First Schedule of the Stamp Act 1949 as RM291,699 based on the par value of the said shares of RM97,232,142.

(9) The respondent objected to the assessment and contended that the assessment should be RM45,000 based on the consideration of RM15,000,000. The respondent's objection was rejected by the Deputy Collector of Stamp Duty.

(10) The respondent having paid the stamp duty of RM291,699 as required by s. 39(1) of the Act filed an appeal in the High Court at Penang against the decision of the Deputy Collector of Stamp Duty by way of Case Stated pursuant to s. 39 of the Act.

Findings Of The High Court

[3] On appeal by way of case stated the following three (3) questions were posed for the opinion of the High Court:

(a) Whether the par value of RM1 per share (or RM97,232,142 for the entire paid-up capital) of Rahman Hydraulic Tin Sdn Bhd ('the company') is the actual value of the company's Shares at the date of the transfer?

(b) If not, what is the value of the company's Shares at the date of the transfer?

(c) What is the duty chargeable on the Form 32A dated 22 November 2004 for the transfer of the 97,232,142 ordinary shares of the company at the consideration of RM15,000,000?

[4] The learned judge of the High Court answered the first question in the affirmative, holding that the par value of RM1 per share was the actual value for the company's shares at the date of the transfer and that therefore, in answer to the third question, the duty chargeable on the Form 32A would be RM291,699 based on the total share value of RM97,232,142.

Findings Of The Court Of Appeal

[5] On appeal the Court of Appeal unanimously allowed the appeal and answered the three questions posed before the High Court as follows:

(a) that the par value of RM1 per share (or RM97,232,142 for the entire paid-up capital) of the company was not the actual value of the company's Shares at the date of the transfer;

(b) that the best available evidence of value of the company's Shares at the date of the transfer was the purchase price of RM15,000,000; and

(c) the duty chargeable on the Share Transfer Form dated 22 November 2004 for the transfer of the 97,232,142 ordinary shares of the company at the consideration of RM15,000,000 was RM45,000.

Leave To Appeal

[6] The appellant was granted leave to appeal by this court against the decision of the Court of Appeal on the following question:

> Whether the value of RM1 per share as stated in the transfer form dated 22 November 2004 or value for the share based on the balance sheet for the financial year ended December 2003, is the value of the company's Share on the date of transfer for the purpose of ascertaining stamp duty payable in respect of transfer of share under item 32(b) of the Stamp Act 1949

Decision

[7] Learned counsel for the appellant before us had forcibly argued that the Court of Appeal judges in reversing the findings of the High Court had misdirected themselves by failing to consider the principle of stamp duty wherein stamp duty is imposed on the instrument and not on the transaction. The case of *BASF Services (M) Sdn Bhd v. Pemungut Duti Setem* [2010] 5

A CLJ 109 was cited as the authority for such a proposition. It is the appellant's contention that to determine the value of shares on the date of transfer, the value of shares as indicated in the Form 32A is the correct value of the shares for stamp duty purposes. On this point we are mindful of the fact that stamp
B duty is imposed on the instrument and not on the transaction. However, in the context of the present case the contents of the instrument Form 32A must be closely examined in ascertaining the stamp duty payable in respect of transfer of shares under item 32(b) of the Act.

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[8] We are of the view the par value of RM1 as stated in Form 32A in the present case is not indicative of the actual value of the shares for the purpose of ascertaining stamp duty. The said Form 32A does not state that the value of the share is RM1 per
D share. The phrase 'Ordinary Shares of RM1 each' appears in the column entitled "Description of Securities" in the said Form 32A and this is only a description of the shares. The words "Ordinary Shares of RM1 each" is the usual form of describing shares and the "RM1" refers to the par value of the shares.

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[9] Furthermore, it is noted that if the appellant's contention is accepted, it would mean that in all cases, the stamp duty on the transfer of shares would be based on the par value stated in the Form 32A or the price, whichever is the higher. However, it is noted that the appellant itself under its Guidelines On the
F Stamping of Share Transfer Instruments For Shares that are not quoted on the Kuala Lumpur Stock Exchange ("KLSE") compares not just the par value with the price but also takes into account the Net Tangible Asset, which is a value that does not appear in the Share Transfer Form at all.

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[10] We are also of the view the par value is not the actual value of the shares. We are in agreement with the findings of the court of Appeal when in answering the first of three questions posed, it held that the par value is not the actual value of the
H shares at the date of the transfer for the reason that par value is only a face value while the value of the company waxes and wanes, amongst other things, according to its performance and outlook. The par value may represent the actual value or true value of the shares on the date the shares were first issued
I (provided that the shares were not issued at a premium) but once the company starts carrying on business, the par value would no longer reflect the actual value of the shares as the company may

have made profits or incurred losses or the assets of the company may have appreciated or depreciated. In the case of the respondent here the par value of RM1 per share (or RM97,232,142 for the entire paid-up capital) does not represent the actual value of the company's shares at the date of the transfer on 22 November 2004 because by then the company had Accumulated Losses amounting to RM418,020,000 and its Net Tangible Asset was in a deficit of RM311,683,000.

[11] It is noted that in both items 32(b) of the First Schedule of the Act and s. 13(1)(b) of the Act, the phrase "par value" is not used. In comparison, item 71 of the First Schedule of the Act which provides for the stamp duty payable on "share warrant or stock certificate to bearer" specifically refers to "the nominal value of the shares or stock specified in the warrant". As stated in Black's Law Dictionary, 8th edition "nominal value" is another term of "par value". On the same point in the Indian case of *Union of India v. Kulu Valley Transport Ltd & Others* (1958) 28 Com. Cas. 29 Punj, the High Court *inter alia* held:

> The phrase 'value of the shares' cannot be read as 'face value of the shares'. If that were the intention of the Legislature, it could have been precisely expressed by using a slightly different language.

[12] On one of the methods of valuation of the shares, in the New Zealand case of *Hatrick v. Commissioner of Inland Revenue* [1963] NZLR 641, the Court of Appeal therein opined that in valuing shares for stamp duty, the task of the Commissioner is to ascertain the true value of the shares, namely what a purchaser desiring to purchase the shares would have had to pay for them on the relevant date to a vendor wiling but not anxious to sell. The said Court of Appeal also identified another method of valuing the shares by stating that if the shares are quoted in the Stock Exchange, the market value of the shares would be the price they are fetching at the relevant time. This indicates that it is the actual value and not the par value of the shares which is relevant for the purpose of ascertaining stamp duty. For the present case in applying the method of valuation of the shares, the figures from the Company's Balance Sheet for Financial Year Ended December 2003 would be relevant as the tender and the subsequent sale of the shares in the Company to the respondent was based on this Balance Sheet. Based on this Balance Sheet, the value of the shares using any of the method of valuation would be nil as the Total Liabilities of the company of RM351,560,000 exceeded the Total Assets of RM39,877,000.

[13] Although the Form 32A was dated 22 November 2004 we are of the view the Court of Appeal was right in holding that there being no evidence that the value of the shares at the date of transfer was more than at the time of the purchase, and given that there was no dispute raised whether the open tender sale was at arm's length or not, the best available evidence of the value of the shares of the company on the date of the transfer is the purchase price of RM15,000,000. In the case of *Union of India v. Kulu Valley Trasnsport Ltd & Others (supra)*, the court after holding that "value of the shares" cannot be read as "face-value of the shares" went on to hold that the consideration paid for the shares can be taken to be the value. This is what the court said:

> The consideration actually paid or agreed to be paid can safely be regarded as the value of the shares. So long as there is nothing to indicate that the consideration was not truly stated in the transfer, the one mentioned therein shall be accepted as the consideration that was, or is, to be paid.

[14] In the present case there is no suggestion that the consideration is anything other than the RM15,000,000 stated in the Form 32A. Furthermore, the manner in which the consideration price was arrived at itself would indicate that it represents the market value of the company's shares. There was an open tender exercise and pursuant to that exercise the appellant's bid of RM15,000,000 was accepted. In any event, as the purchase price of RM15,000,000 is higher than the value of the shares based on the balance sheet, pursuant to item 32(b) of the Act, the stamp duty would be assessed on the purchase price. In the circumstances it is our judgment that the value of the shares based on the balance sheet for the financial year ended December 2003 is the value to the company's shares on the date of the transfer for the purpose of ascertaining stamp duty payable in respect of transfer of share under item 32(b) of the Stamp Act 1949. Therefore, the stamp duty payable on the Form 32A would be based on the sale consideration of RM15,000,000.

Conclusion

[15] For the reasons above stated we would dismiss the appellant's appeal with costs. We award a sum of RM15,000 as costs to the respondent. The deposit is to be paid to the respondent towards costs.